

## **INITIAL STATEMENT OF REASONS:**

This action amends provisions governing Incompatible Activity concerning employees of the California Department of Corrections and Rehabilitation (Department) serving as expert witnesses. This action clarifies the processes for notification and approval when an employee is subpoenaed as an expert witness for the purpose of eliciting testimony based upon expertise gained in the course of employment with the Department. Furthermore, this action adopts provisions regarding departmental compensation when any state employee who is obliged by such subpoena to attend as an expert witness.

This action also makes non-substantial changes to existing language correcting the typographical errors in numbering specific subsections and makes language consistent throughout the section.

This regulation clarifies that employees of the Department shall not engage in any other employment or activity inconsistent or incompatible with employment by the Department. Any employee who has been identified, or requested to participate as an expert witness using expertise gained in the course of his or her duties with the department, shall notify in writing the Chief Deputy General Counsel of the Office of Legal Affairs. Additionally, upon receipt of the employee's written notification of required testimony, the Chief Deputy General Counsel of the Office of Legal Affairs shall determine if there is a need to quash the subpoena.

This regulation adopts language pursuant to Government Code (GC) Sections 68097.1, 68097.2(a) and (b) regarding compensation to which they are normally entitled from the Department during the time they travel to and from the place where the court or other tribunal is located, and while they are required to remain at that place pursuant to the subpoena. Additionally, the employee shall also receive from the Department the actual necessary, and reasonable traveling expenses incurred by him or her in complying with the subpoena.

The Department has determined that no reasonable alternatives to the regulations have been identified or brought to the attention of the Department that would lessen any adverse impact on small business.

The Department has made an initial determination that the action will not have a significant adverse economic impact on business. Additionally, there has been no testimony or other evidence provided that would alter the Department's initial determination.

The Department has determined that this action imposes no mandates on local agencies or school districts, or a mandate, which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4.

The Department must determine that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective, and less burdensome to affected private persons than the action proposed.

**Subsection 3413(a) is amended** to include language that reinforces the departmental rules and procedures regarding incompatible activity. Existing language states that no employees will engage in any other employment or activity inconsistent or incompatible with employment by the Department. The words "no employee.... will engage" are being changed to "employees...shall not engage...." This change is necessary clarify that employees of the Department are expressly prohibited from serving as an expert witness when the content of the expert testimony is from experience gained at work, and shall not engage in such activity or other employment that is inconsistent or incompatible with employment by the Department.

**Subsection 3413(a)(1) is amended** to change the wording from "Department of Corrections" to "department." This is necessary to make language consistent throughout this section.

**Subsection 3413(a)(2) is unchanged.**

**Subsection 3414(a)(3) is amended** to include language regarding potential conflict or appearance of a conflict of interest with the employee's job as a category of activity inconsistent or incompatible with department employment.

Subsection 3413(a)(4) is unchanged.

Subsection 3413(a)(5) is deleted.

**Subsection 3413(a)(6) and (7) is renumbered to (5) and (6), respectively.**

**Subsection 3413(a)(6)(A)(1) through (3) is renumbered to (A)1. through 3. to correct a non-substantial typographical error.**

Subsection 3413(a)

**Subsection 3413(a)(6)(A)(4) is deleted.**

**Subsection 3413(a)(6)(B) is amended** to change the upper case "D" in the word Department to a lower case "d". This is necessary to make language consistent throughout this section.

**Subsection 3413(a)(6)(C) through (a)(6)(H) is unchanged.**

**Subsection 3413(a)(8) through (11) are numbered to (a)(7) through (a)(10), respectively and (10) is amended** to state that departmental employees who are consulting or testifying as a specialist or an expert witness, specifically, based on expertise gained in the course of their duties without having given reasonable notice to the Chief Deputy General Counsel of the Office of Legal Affairs is now clarified that it is included in the category of incompatible activity. This is necessary because employees, who are deemed "expert witnesses" merely because of expertise gained in the course of their duties with the Department and are subpoenaed to testify, are providing unauthorized testimony, and creating an inappropriate conflict of interest between their employer and the initiator of the subpoena. Often times these employees are subpoenaed to testify against the Department in regard to policies and procedures, and departmental employees who have provided training or to whom the "expert witness" has trained in the course of their duties. This testimony is often times not consistent or not reflective of actual departmental policies and procedures.

**New subsection 3413(a)(10)(A) through 3413(a)(10)(C) is adopted** to specify the process by which an employee, who receives a subpoena issued for the purpose of eliciting testimony, as defined in Evidence Code section 720, shall follow. The employee, shall within one (1) business day of receipt of service of the subpoena, notify in writing the Chief Deputy General Counsel of the Office of Legal Affairs; including all relevant information concerning the contact and a synopsis of their anticipated testimony.

Additionally, this subsection makes clear that the Chief Deputy General Counsel of the Office of Legal Affairs, or designee, retains the discretion to seek to quash the subpoena on any substantive or procedural grounds before the judicial body through whose authority the subpoena was issued.

This language is necessary to ensure the process set forth in GC Section 68097.1, specifically pertaining to "other state employees...required as a witness before any court...in any civil action or proceeding in connection with a matter, event or transaction concerning which he or she has expertise gained in the course of his or her duties...." This regulation aids the "subpoenaed expert witness" in following the

process set forth by statute and the Department. Additionally, this regulation is specific to “expert witnesses,” and does not apply to employees who are actual witnesses to an event, subpoenaed because of what they perceived or investigated in the course of the course of their duties or when an employee has been requested to testify as an expert witness by the department.

**Subsection 3413(b) is amended** to add language regarding the reporting of incompatible activity when the employee is self-employed. This is necessary due to the fact that there are licensed professionals employed with the Department who also maintain their own businesses. These individual’ businesses are considered outside employment or an enterprise, and therefore, they must submit all pertinent information pursuant to this subsection.

**Subsection 3413(c) is amended** to include the words “with the department,” to make clear that if violations of the provisions occur, then termination of employment specifically with the Department may result.

**The Heading for new Section 3413.1 is adopted to read, Compensation for Witnesses.**

**New subsections 3413.1(a) through (c) are adopted** to make specific GC Section 68097.2. Pursuant to GC Section 68097.2(a), any state employee who is obliged by a subpoena to attend as a witness before any court or other tribunal in any civil action or proceeding in connection with a matter, event or transaction which her or she has expertise gained in the course of his or her duties, shall receive the salary or other compensation to which he or she is normally entitled from the Department during the time they travel to and from the place where the court or other tribunal is located and while they are required to remain at that place pursuant to the subpoena. Additionally, the employee shall also receive from the Department the actual necessary, and reasonable traveling expenses incurred by him or her in complying with the subpoena.

Furthermore, GC Section 68097.2(b) the Department shall require (1) an amount of up to one hundred fifty dollars (\$150) to accompany the subpoena of an “expert witness” upon delivery to the person accepting the subpoena for each day that the state employee is required to remain in attendance pursuant to the subpoena; (2) the party who requested the subpoena be issued to reimburse the Department for the full cost incurred in paying the State employee’s salary or other compensation and traveling expenses for each day required by the subpoena; and (3) any employee who meets the requirements of subsection 3413.1(a) shall submit to his or her immediate supervisor an itemized travel expense claim within two (2) business days of his or her testimony. This is necessary to ensure that statute is adhered to and that during the fiscal crisis of the State that all money paid to departmental employees is recovered when they are approved by the Department as “expert witnesses.”

**New subsection 3413.1(d) is adopted** to make specific GC Section 68093 regarding witness fees received by an employee who is subpoenaed to testify as to what they witnessed, not for their expertise gained in the course of their employment with the Department. These employees are not “expert witnesses.” The fees shall be relinquished to the department if the employee has been on pay status during the duration of their testimony. Additionally, pursuant to Title 2, Division 5, Section 18674, Witnesses at a hearing or investigation are entitled to the same fees as are allowed witnesses in civil cases in courts of record. If a witness is subpoenaed by the accused, or any person other than a State agency, the fees and mileage shall be paid by that person and are not proper charges against any State fund. This is necessary to ensure that statute is adhered to and that during the fiscal crisis of the State that all money paid to departmental employees who testify as witnesses while on pay status, is recovered by the Department.